



2004 Report to the Legislature

Water Banking in Washington

December 2004

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Summary

The Department of Ecology (Ecology) was authorized by the legislature to use water banking in the Yakima River Basin to meet water supply needs. A work group was formed to assist in the design of a water bank. A written report covers the decisions and recommendations of the work group. Ecology and the U.S. Bureau of Reclamation (Reclamation) drafted a memorandum of agreement (MOA) to govern the operation of the proposed bank. However, the MOA is not yet final, and as a result, a formal system of water banking has yet to be implemented in the Yakima River Basin. Ecology hopes to have a final MOA in early 2005, and to then establish the Yakima Water Exchange.

Introduction

On May 7 of 2003, Governor Locke signed Engrossed Substitute House Bill 1640 authorizing the Ecology to use the trust water rights program in the Yakima River Basin for water banking purposes. The new law amended sections of chapter 90.42 RCW which establishes a statewide trust water rights program. The bill also required that Ecology seek input from various water stakeholders on water banking procedures and help identify areas of the state where water banking could assist in providing water for instream and out-of-stream uses.

This report fulfills the requirement in the legislation that Ecology report its findings and recommendations to appropriate legislative committees by December 31 of every even numbered year. In addition, the report must evaluate the effectiveness of water banking under the statute and describe statutory, regulatory or other impediments to water banking in the state.

Under the new legislation, Ecology was authorized to use water banking in the Yakima Basin for the following purposes:

- Mitigation for new water uses,
- Meeting future water supply needs, or
- Any statutorily beneficial uses consistent with terms established by the transferor.

Water banking may also be used to document transfers of water rights to and from the trust water rights program; and provide a source of water rights Ecology can make available to third parties on a temporary or permanent basis for any statutory beneficial use.

Under this statute Ecology may not use water banking to cause detriment or injury to existing rights, issue temporary rights for new potable uses, administer federal project water rights, or allow carry-over of stored water from one water year to another water year. Additionally, return flows from water rights authorized for any purpose must remain available as part of the Yakima River Basin's total water supply available and to satisfy existing rights for other downstream uses and users.¹

¹ "Total water supply available" is defined for water banking purposes consistent with the 1945 consent decrees between the United States and Yakima River basin water users (Federal District Court, in KRD, et al., v. SVID, et al.) and later court interpretations.

Early Yakima efforts (prior to passage of HB 1640)

The federal government expressed a strong interest in facilitating the voluntary transfer of water in the Yakima River Basin. In late 1994, Congress passed Public Law Number 103-434, Title XII, known as phase two of the Yakima River Basin Water Enhancement Project (YRBWEP). It was designed to address two problems in the Yakima basin:

- a. Remedy the severe degradation in salmon habitat and numbers of fish.
- b. Stabilize the water supply for irrigation during dry years.

The federal legislation sought to address both problems by facilitating water conservation and other ways of making the water supply in the basin more flexible and responsive to current needs. The legislation also requested consideration of more innovative ways to free up water for current needs, such as water transfers, water banking, dry year options, and the sale and leasing of water among agricultural users and for instream flows.

Under the federal Yakima River Basin Water Enhancement Project, the Conservation Advisory Group was tasked with providing recommendations consistent with the State of Washington statutes on rules, regulations, and administration of a process to facilitate the voluntary sale or lease of water. This empowered Conservation Advisory Group to investigate ways to use water-right transfers to better manage water during all years, but particularly during droughts. During the 2001 drought year, federal, state and irrigation district water depositories/banks were used to enable the temporary transfer of water among users. This included holding water (made available through fallowing of lands) in the US Bureau of Reclamation (Reclamation) project reservoirs for release when needed by irrigators, and holding of tributary water rights in the state Trust Water Rights Program for use by municipalities, and for irrigation and in-stream needs

A Water Transfer Working Group (WTWG) was organized by Reclamation and began meeting in late March of 2001 to review and facilitate proposed emergency water transfers among Yakima Basin water users to minimize water supply shortfalls caused by the severe drought conditions in 2001. The WTWG is comprised of the major water stakeholders in the Yakima Basin including representatives from various state and federal agencies, irrigation districts and the Yakima Nation, as well as any other interested parties. The YRBWEP Conservation Advisory Group provided guidance and ongoing support to the WTWG throughout the 2001 drought year, as WTWG reviewed proposed water transfers within the Yakima River Basin. The WTWG continues to meet and review proposed Yakima Basin water transfers and continues to be supported by Conservation Advisory Group.

The Conservation Advisory Group continues to work on identifying ways of facilitating the voluntary sale or lease of water, i.e., examining and developing water banking in the Yakima Basin. The work of the Conservation Advisory Group and the WTWG represent first steps towards the creation of a Yakima Basin water bank. In 2001 the WTWG initiated a process to provide services that facilitated temporary water right transfers quickly and efficiently. The objective was a 15-day turn around for transfer decisions which was possible because all of the key agencies were represented. A 45-day turn around period has been the goal in subsequent non-drought years.

Decisions were made by consensus, and transfers projects were selected for consideration using the following criteria:

- Total Water Supply Available (TWSA) neutrality is maintained.
- Equivalent reductions are made in consumptive use.
- Water would have been used if not for the transfer.
- Transfer adheres to specific delivery schedule.
- There is no adverse change in instream flow.
- Transfer satisfies operational considerations.

For transfers that were not problematic, this process worked very well. Because there had been success using the WTWG to facilitate transfers, Ecology hoped to include this process as part of the design for a water bank in the Yakima Basin.

Ecology decided to try water banking in the Yakima basin because several key factors were in place that supported water banking and increased the likelihood of success. Those include:

- A surface water rights adjudication of the entire basin is nearly completed. This creates more certainty regarding the quantity, priority and validity of water rights in the basin.
- A system of water storage run by the U.S. Bureau of Reclamation lends itself to strategies which hold water to release at critical periods creating pulse flows for outward migration of salmon.
- The Yakima Basin has one of the more advanced watershed planning efforts in the state, which has resulted in wide-spread support for restoration of fish runs.
- There is an established group (Conservation Advisory Group) already functioning to review and expedite surface water transfers in the basin.
- The YRBWEP legislation directs the Conservation Advisory Group to provide recommendations for methods to facilitate water transfers such as water banking.
- There is a strong history of water acquisition and transfer partnerships within the YRBWEP framework, and the Conservation Advisory Group has piloted a process that can help to expedite review and transfer of water rights.

Yakima Water Bank Work Group

Before adoption of house bill 1640, Ecology was pursuing the establishment of a water bank in the Yakima Basin as part of its water acquisition strategy of 2002². This meshed well with the goals and activities of the YRBWEP and the WTWG. Ecology had received a grant of \$67,500

² Washington Water Acquisition Program, Finding Water to Restore Streams, Washington Department of Ecology, January 2003, publication No. 03-11-005, is available on the Department of Ecology website at: <http://www.ecy.wa.gov/programs/wr/.wrhome.html>, click on the Water Acquisition Program.

in the fall of 2002 from the Bonneville Power Administration through the National Fish and Wildlife Foundation. The grant was matched in equal amount by Ecology to create and implement the bank.

A portion of the available grant funding was used to contract with a facilitation firm, Roundtable Associates, who worked in cooperation with Ecology and Reclamation to form a work group to assist in developing recommendations for the formation of the water bank. The Yakima Water Bank Work Group (Work Group) consisted of the membership from the existing WTWG and additional representatives from environmental groups, the Washington Water Trust, and from local planning efforts.³ Minutes from the work group meetings can be found on Ecology's website.⁴

The work group met regularly over the course of a year to design a Yakima Basin water bank based on the WTWG experience. We found that even those who had been working on water transfers in the WTWG (which functioned similar to a water bank) were unclear exactly what we meant by the term water bank. It took the Work Group several months of meetings to come to agreement, and our final definition was very broad.

We determined, for the purposes of this Work Group, that *any* way that water was held for future use was considered banking. This definition of water banking included the storage of water behind dams that Reclamation operated, water leasing similar to the bank operated by the Washington Water Trust in the Okanogan River Basin, and the acquisition activities of those using the state trust statutes including Ecology, the Washington Water Trust, Reclamation and the private sector. The definition also included both temporary (leases) and permanent purchases of water rights.

To avoid any baggage associated with the term water bank, the Work Group decided to use the term "exchange" (borrowed from the private regional bank in the Deschutes River region of Oregon) to encompass all water banking activities in the Yakima River Basin. The new Yakima Water Exchange would be the umbrella under which all banking operations in the Yakima Basin could exist and flourish.

Scope and governance

The Work Group discussed the scope of the Yakima Water Exchange's activities--whether the Yakima Water Exchange should have a "fish friendly" or "fish neutral" focus in terms of transfers facilitated. The majority of the funds that are available to state and federal agencies are based on the goal of increasing instream flows for fish passage. However, 1640 clearly directs Ecology to use the trust program for purposes including mitigation of new uses, providing future water supply needs, or any statutorily beneficial uses consistent with terms established by the transferor. The Work Group acknowledged that with limited water supply options in the basin, there would be benefits associated with including those water supply options in the Yakima

³ See Appendix A for membership list.

⁴ For Work Group minutes go to <http://www.ecy.wa.gov/programs/wr/instream-flows/wacq.html> and click on Yakima River Basin Water Bank, then click on "meetings" which is located at upper left hand side.

Water Exchange. They also recognized that there would be a much more robust banking operation if both instream and out-of-stream needs are addressed, which could provide more opportunities to transfer water rights to increase instream flows. The Work Group recommended that the operation be fish-neutral in its activities, which means that all needs would be serviced.

The Work Group discussed how banking activities might be separated along funding lines related to future water supply and instream flow benefits for fish. They also discussed ways to facilitate transfers to trust in areas where there is a predetermined need to restore instream flows for fish. One suggestion resulting from that discussion which has potential is for ‘standing offers to purchase or lease water for instream flows in predetermined reaches.’

Another key question for the Yakima Water Bank Work Group was organizational structure. Three forms of governance were considered for the Yakima Water Exchange:

1. Government – a collection of governments with intergovernmental agreements
2. Private - nonprofit
3. Private - for Profit

The private for profit governance structure (3) would be impractical at this phase in the development of a water exchange because there is no way to assure enough exchange “business” on a continuous basis to motivate interest in establishing a for-profit entity.

The government form (1) based on intergovernmental Memoranda of Agreement was considered to be the most practical in the early stages of Yakima Water Exchange development, particularly because of available funding. It was not necessarily our preferred option. The private nonprofit form based on incorporation (2) that includes a board of directors and bylaws may be a form that the Yakima Water Exchange evolves to as it matures. Either of these forms of governance allows flexibility in the organization of the Yakima Water Exchange.

Work Group results and implementation

A written report covers the decisions of the work group and details for activities in which the Yakima Water Exchange may participate.⁵ In the report, the work group envisioned two groups to implement the new Yakima Water Exchange. One is a technical group based on the general make-up of the WTWG as a technical mechanism to expedite temporary and/or permanent water transfers, and the other is an executive council to guide decisions. The Work Group viewed the state trust program as the “vault” in which water rights would be held.

Ecology and Reclamation drafted an MOA to govern joint operation of the Yakima Water Exchange and joint management of trust water rights in the Yakima Basin. It has not received final approval at this date. Questions also remain as to ongoing funding and staffing of the

⁵ The report: Water Exchange in the Yakima Basin, October 6, 2003, is available at <http://www.ecy.wa.gov/programs/wr/instream-flows/wacq.html> Click on: Water Bank Report Version 5.1 Final Draft, which is located in the column at the right.

Yakima Water Exchange. The YRBWEP Conservation Advisory Group continues to operate, and the funding for the process associated with it was recently re-authorized by Congress. The WTWG continues to meet and review proposed Yakima Basin water transfers, with the support of the Conservation Advisory Group.

As of December 2004, formal water banking has not yet been implemented in the Yakima River Basin, or in other areas of Washington state. We hope to have a final MOA in early 2005, and to then establish the Yakima Water Exchange,

Stakeholder meetings

During the development of a design for the Yakima Water Exchange, Ecology met with stakeholder groups around the state to discuss water banking. Again, there was much confusion as to what a water bank entailed, and some controversy associated with it.

Groups we met with included:

- Yakima Basin Irrigators Joint Board, representing the interests of irrigators in the Yakima River Basin.
- Tri-County Water Resource Agency, which is responsible for the Yakima Basin watershed planning.
- Kittitas Conference of Governments, representing the leadership of the county and municipal governments of Kittitas County.
- An ad-hoc group of statewide environmental groups.

Other groups that were scheduled for meetings in 2004, but were not able to meet with us were a collection of Yakima County governments, the Yakima Sub basin Fish and Wildlife planning board, and the Yakima Farm Bureau.

Through the meetings with the work group and with private stakeholder groups several concerns were identified. One was that water banking could lead to increased out-of-stream water use if people who may not have been maximizing their use of their water rights lease them to others who extract their full amount resulting in less water in streams. The agricultural groups did not trust government, and specifically Ecology, to administer the bank and examine or use their water rights, fearing that it might result in a loss of all or a portion of their rights. Relinquishment was the overriding concern for many, in spite of statutory protections for water rights while in trust.

Concerns from the environmental community involved the possibility that the banks would be run by the private sector and would result in more privatization of public resources, would not result in environmental benefits, and would create a more opaque system that was difficult to track from the outside. Many groups expressed concern that this use of the trust program will encourage speculation with water rights, meaning they are purchased and held in trust until the demand for and price of the rights has risen substantially. Finally, all of the groups expressed concern regarding the potential for well-funded organizations to acquire disproportionate shares of basin water.

Other potential difficulties

Ecology has had some difficulties in the past finding water in identified priority areas to purchase or lease for environmental acquisition efforts. This difficulty in facilitating trades may impede water banking efforts. There are many possible reasons for this difficulty.

One is that the areas identified for environmental water acquisition are usually located on tributary streams with a limited number of water rights, rather than on larger rivers.

Another reason is many in the agricultural sector are uncomfortable negotiating with Ecology, since Ecology also has regulatory jurisdiction over their water rights. Ecology has contracted with the Washington Water Trust to provide the first line of communication with individual water right holders. This has increased the comfort level for some individuals. Ecology is also working with the Conservation Commission and individual conservation districts to communicate with potential water right holders who may be interested in the acquisition program. A water bank offers another entity to work with when leasing or selling a water right and may provide a more comfortable option for water right holders to trade water. Ecology commissioned a report from the Policy Consensus Center (Washington State University and The University of Washington) to learn more about how the department's water acquisition program is perceived by the agricultural community.⁶

A third reason for difficulty in securing trades is that many landowners are uncomfortable separating their water right from their land. In the current market separation of the two can be an advantage or disadvantage depending on the local economy. Landowners are concerned about the effect the loss of the water right could have on the value and potential use of the land. Also, it is more difficult to determine market value of water separated from the land to which it is attached. For this reason, the ability to purchase the land and water together provides an advantage to the purchaser. While Reclamation may purchase land and water together, Ecology does not have the authority to do so. This is one of the reasons the two agencies have partnered on some acquisitions. In some instances it would be helpful for Ecology to be able to purchase land and water together.

In the Yakima Basin a large portion of the available water is managed by Reclamation. Reclamation leases and purchases both water and land for environmental mitigation. Ecology also partners with Reclamation on water leases and purchases in the basin. These two agencies sponsor much of the trading activity in the basin, and would be important participants in creating an active market for any banking activities. However, Reclamation is hindered by federal acquisition regulations that place strict limitations on obtaining separate valuations of land and water. This has been an impediment to water trading in the basin. Federal regulation regarding land and water acquisition would need to be amended to alleviate this problem.

The federal restrictions fail to recognize a market trend that is emerging whereby the separate sale of the land and the separate sale of the appurtenant water, in sum, can yield a combined total value that exceeds the appraised value of the land with its appurtenant water right. The federal

⁶ The report, "Of Water and Trust: A review of the Washington Water Acquisition Program," is available on a website at <http://depts.washington.edu/wsuuwpcc/reports/water2004.pdf>

acquisition regulations do not allow the sum of the parts to exceed the value of the whole, and thus tend to undervalue water. This has put Reclamation at a competitive disadvantage in the Yakima Basin market. Federal land appraisers are using the federal acquisition regulations to conduct water valuations, whereas expert water valuation specialists in the private sector are using less restrictive valuation methods to more accurately determine the value of water.

Federal regulations regarding land and water acquisition would need to be amended to alleviate this problem, perhaps by exempting water acquisition from certain land appraisal restrictions.

State legislative fixes needed

The new law amended sections of chapter 90.42 RCW which established a statewide trust water rights program but not 90.38 RCW which establishes a trust water rights program just in the Yakima Basin. For this reason it appears to apply state-wide. However, the legislation clearly states, as codified in RCW 90.42.100 (1), that “The department of Ecology is hereby authorized to use the trust water rights program in the Yakima Basin for water banking purposes.” The legislation also includes a new authority for Ecology to transfer rights from the trust program to a third party. Because this new authority is included, some feel this is why the legislation was limited to the Yakima Basin, and that it does not limit the pre-existing authority to use the trust water rights program in the rest of the state. After a review of legislative history and the legislative bill report, it seems fairly clear that the limitation of authorization to the Yakima Basin was intentional. However, because the functions of the state trust water program and water banking are so similar, and because water banking is not defined in the legislation, there are questions about how to separate statewide activities using the trust program from water banking activities in the Yakima Basin.

If the legislation does indeed limit Ecology’s water banking authority to the Yakima Basin, then it would need to be amended to authorize water banking if it were to be used in other areas of the state. There also needs to be some clarification as to what the legislature considers water banking activities, and how they differ from other activities authorized under the trust program.

Also, as was mentioned earlier, it would be helpful in some cases for Ecology to have the ability to purchase land and water as a package, particularly where the land would provide habitat benefits for critical salmonid stocks or other important public needs, or where the sale of a critical water right is dependent on purchase of both land and water.

Potential benefits

The work group believes the creation of a Yakima Water Exchange will assist efforts to provide water for presently unmet needs in the Yakima Basin. Those unmet needs include 1) increasing and protecting instream flows for the benefit of fish and wildlife, and 2) providing water for new and existing off-stream water uses.

The ability to utilize the state Trust Water Rights Program to create and protect instream flow trust water provides the key mechanism to slowly, incrementally, increase instream flows for fish and wildlife in the Yakima Basin. We hope that the Yakima Water Exchange will facilitate

transfers of water between willing sellers and the entities currently actively seeking to purchase water for instream flow improvement and will also increase the ability to implement incentives for water right changes and transfers for instream flow purposes.

The creation of a Yakima Water Exchange will likely also improve the ability of water users to complete voluntary water transfers to satisfy presently unmet off-stream water needs. A facilitating process is needed to provide for the transfer of water from willing sellers to purchasers seeking to develop new off-stream water uses.

The Yakima Water Exchange would provide the clearinghouse to connect water-sellers with water-purchasers for both off-stream and instream use applications. Willing sellers and buyers of water do exist in the Yakima Basin. However, they are finding it difficult to locate each other. The establishment of a Yakima Water Exchange will help to solve this problem by creating a known, centralized place where sellers and buyers can connect.

Water transfers are approvable only where the proposed transfer will cause no detriment or injury to other existing water rights and Yakima Project operations.

The new legislation also authorized the use of the trust water program to facilitate third party transfers which provides flexibility in movement of water. Water can be transferred to another user when it is removed from trust without the more burdensome requirements of using a change application. This authority was used recently to support the efforts of the temporary bank that was established to provide water to post 1905 domestic water right holders in the Yakima Basin.

Water banking and post 1905 water-right holders in the Yakima Basin

The Yakima Basin Adjudication Court issued an order on July 29, 2004 granting a motion by the Selah-Moxee Irrigation District (SMID) that allowed the transfer of 44 acre-feet of water from the district to instream flow as mitigation to offset out-of-priority in-house domestic water use for many of the post-1905 water right holders in the Yakima Basin. These domestic water users were required under a previous court order to discontinue their use of surface water, except for in-house purposes, during the 2001 drought.⁷

The July 29, 2004 court order, which applied only to the 2004 irrigation season, allowed affected domestic water right holders to apply to the SMID to lease a portion of the transferred water retroactive to June 16, 2004. However, the court placed a condition in its order to require the SMID to notify Ecology and the other members of the Water Transfer Working Group regarding such applications to allow parties to object to granting of an individual lease that might be injurious to senior water right holders.

The post-1905 domestic water right holders were able to apply for varying amounts of water depending on the nature of their water use, for example: 1) indoor and limited outdoor use for full-time residences, 2) indoor use only for full-time residences, 3) indoor and limited outdoor

⁷ The list and map of the post-1905 domestic water right holders affected by the previous court order can be accessed at the following link: <http://www.ecy.wa.gov/programs/wr/rights/post1905.html>

use for part-time (recreational) residences, and 4) indoor use only for part-time (recreational) residences. Those post 1905 domestic water right holders that leased water from the SMID and whose transfers were not determined to be injurious to senior water right holders were granted relief from the court order against diversion of surface water. A total of 18 water right holders operating water systems serving 178 homes participated in the lease bank using the SMID's trust water approved by the court on July 29, 2004. The total estimated use of leased water was 6.55 acre-feet.

Ecology was responsible for monitoring whether water users were complying with the court's orders concerning surface water use by post-1905 water-right holders and by property owners without court-validated rights or claims to divert water (as well as any other surface water use without authorization). Ecology representatives made field verification visits and provided reports to the court as ordered. However, decisions as to whether to pursue imposition of sanctions against apparent violators were left to the judge and parties to the motion that requested the court to issue the orders concerning the post-1905 water right holders, and to property owners without court-validated rights or claims to divert surface water.

This banking effort was successful in providing water to those water systems who participated. The quick response to a shortage of water was possible because of the new authority for third party transfers that house bill 1640 provided.

Water banking in other areas of Washington state

The water bank that was designed in the Yakima River Basin was specifically focused on meeting local needs. However, we have learned much from the process and hope there will be lessons that can help with the design of future water banks in other areas of the state. Considerable interest has been expressed in the possibility of using water banking.

The Columbia River Initiative has included some form of water banking or other water acquisition method in several drafts. This is intended to help meet the need for new water supplies or to supplement limited water rights, but the proposal faces some opposition.

A large number of local watershed planning groups (planning under Chapter 90.82 RCW) are examining the potential of water banking as one of many options to address water supply issues. Several planning groups have mentioned water acquisition and water banking as future options in their draft watershed planning documents.

Multiple water leases are being implemented through irrigation districts in the Dungeness River Basin to benefit instream flows. This effort is similar to, and likely a precursor to, future water banking efforts in that area.

We recommend that water banking be pursued in other portions of the state, if there is local support for the activity, and it meets some of the same criteria (as listed on page 3) that was used to determine likelihood of success for the Yakima water banking effort. Some watersheds that have expressed interest are the Entiat, the Walla Walla, the Dungeness, the Deschutes, the Colville and the Nooksack.

Okanogan Lease Bank

As part of a larger restoration effort for Salmon Creek, the Colville Tribes asked Washington Water Trust to negotiate and enter into a lease with the Okanogan Irrigation District for water to be used to restore streamflows at critical periods for salmonids listed under the Endangered Species Act. To date, Washington Water Trust has negotiated three annual leases with the Okanogan Irrigation District – in 1999, 2000, and 2001. Change applications were also filed to change the use of the water leased from the Okanogan Irrigation District to a trust water right for instream flows. In 2001, a change application was filed that would allow up to 25 cubic feet per second (cfs) and 3,000 acre-feet of water per year to be used for instream flows until the year 2010. Washington Water Trust has negotiated with the Okanogan Irrigation District on an annual basis for the actual amount of water to be used each year for instream flows, and has committed to notifying Ecology of the amount of water leased for instream flows by April 1 of each year.

The water leased from Okanogan Irrigation District is released pursuant to a schedule developed by the Okanogan Irrigation District and the Colville Tribes. The release schedule is developed to provide water at critical times for listed salmonids and to accommodate the needs of the Okanogan Irrigation District. The Washington Water Trust meets with the irrigation district and the Colville tribal staff every fall to discuss and agree to what the next year's leasing program might look like in terms of water needs for fish and the irrigation district. During the winter they monitor water availability and usually decide mid-March whether they want to go ahead with a lease for the year. The water leasing program is an excellent example of how collaboration and flexible use of the Trust Water Rights Program can help restore stream flows for fish while ensuring a water supply for agricultural needs.

Examining water banking programs in other states

Recognizing the concerns related to water banking, Ecology researched how this water management tool was used in other states. Water banking programs in all of the western states were examined, and a report summarizing their programs was published in June 2004 (see Appendix B). The report identified water banking as a method that is still developing, but has had some success. Interestingly, regional banks that are run at a single or multiple watershed level were found to be more active than statewide banks.

Of particular interest to Ecology and the Yakima Water Banking Work Group is a regional water bank, the Deschutes Water Exchange in Oregon on the Deschutes River. This bank is run by a private non-profit organization, the Deschutes Resources Conservancy, which is partially subsidized by federal funds. The bank is primarily focused on environmental mitigation and enhancing instream flows.⁸

⁸ Information about the activities of the Deschutes Resources Conservancy may be found at the following link: www.deschutesrc.org

Conclusion

Water banking is a relatively new to the Northwest. Because it is new, and because there are so many different definitions of water banking, there are some concerns about how it might be used. However, it has clearly been beneficial in the few instances we have examined. Keeping the possible pitfalls in mind, Ecology is cautiously optimistic about the potential benefits of establishing water banks in some areas of our state.

Appendix A

Yakima Water Bank Work Group Participants

This is a list of those who participated in the development of the Yakima Water Exchange proposal. Each person on the list attended at least one meeting.

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Appendix B

Report on Water Banks in the Western States

It was at the completion of the stakeholder group's design of the water Exchange and after observing the confusion and controversy associated with water banks that Ecology determined there was a need to organize and publish our research on water banking. We contracted with Westwater Associates which included Clay Landry and his associate Andrea Larsen-Hayden to organize and help develop a report working with the research provided by Ecology's Peggy Clifford and with editing by Ecology's Christine Corrigan. The report, entitled ANALYSIS OF WATER BANKS IN THE WESTERN STATES, by Peggy Clifford, Clay Landry, and Andrea Larsen-Hayden, is available on Ecology's website at <http://www.ecy.wa.gov/programs/wr/instream-flows/wtrbank.html> .

The report "Analysis of Water Banks in the Western States" provides an analysis of water banking legislation, policies, and programs in 12 Western states. A primary purpose of the review is to identify banking programs and structures that promote and enhance environmental trades. The analysis examines each state individually beginning with the legislative history of the development of the banking programs. In addition, the review provides a detailed description of banking rules and level of activity, and maps of the areas served in each state.

The review of water banking programs includes the characteristics that influence program participation and an assessment of program pricing structures and transaction contracts. The analysis generated a set of questions that should be addressed, and guidelines to consider, when establishing a water bank. The states reviewed are Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Texas, Utah, Washington, and Wyoming.

Ecology hopes that the report will provide useful information for groups in our state who are wondering how existing water banks operate and whether a water bank might be a useful water management tool for their region.

Appendix C

ENGROSSED SUBSTITUTE **HOUSE BILL 1640**

AS AMENDED BY THE SENATE

Passed Legislature - 2003 Regular Session

State of Washington

58th Legislature

2003 Regular Session

By **House** Committee on Agriculture & Natural Resources (originally sponsored by Representatives Linville, Hinkle, Grant, Chandler, Eickmeyer and Hankins)

READ FIRST TIME 03/05/03.

AN ACT Relating to authorizing water banking within the trust water program; amending RCW 90.42.005; adding new sections to chapter 90.42 RCW; creating a new section; and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 1 RCW 90.42.005 and 1991 c 347 s 1 are each amended to read as follows:

- (1) It is the policy of the state of Washington to recognize and preserve water rights in accordance with RCW 90.03.010.
- (2) The legislature finds that:
 - (a) The state of Washington is faced with a shortage of water with which to meet existing and future needs, particularly during the summer and fall months and in dry years when the demand is greatest;
 - (b) Consistent with RCW 90.54.180, issuance of new water rights, voluntary water transfers, and conservation and water use efficiency programs, including storage, ((should be the preferred)) all are acceptable methods of addressing water uses because they can relieve current critical water situations, provide for presently unmet needs, and assist in meeting future water needs. Presently unmet needs or current needs includes the water required to increase the frequency of occurrence of base or minimum flow levels in streams of the state, the water necessary to satisfy existing water rights, or the water necessary to provide full supplies to existing water systems with current supply deficiencies; ~~((and))~~
 - (c) The interests of the state and its citizens will be served by developing programs and regional water resource plans, in cooperation with local governments, federally recognized tribal governments, appropriate federal agencies, private citizens, and the various water users and water interests in the state, that increase the overall ability to manage the state's waters in order to resolve conflicts and to better satisfy both present and future needs for water; and
 - (d) Water banking as a function of the trust water program and as authorized by this chapter can provide an effective means to facilitate the voluntary transfer of water rights established through conservation, purchase, lease, or donation, to preserve water rights and provide water for

presently unmet and future needs; and to achieve a variety of water resource management objectives throughout the state, including drought response, improving streamflows on a voluntary basis, providing water mitigation, or reserving water supply for future uses.

NEW SECTION. Sec. 2 A new section is added to chapter 90.42 RCW to read as follows:

(1) The department is hereby authorized to use the trust water rights program in the Yakima river basin for water banking purposes.

(2) Water banking may be used for one or more of the following purposes:

(a) To authorize the use of trust water rights to mitigate for water resource impacts, future water supply needs, or any beneficial use under chapter 90.03, 90.44, or 90.54 RCW, consistent with any terms and conditions established by the transferor, except that return flows from water rights authorized in whole or in part for any purpose shall remain available as part of the Yakima basin's total water supply available and to satisfy existing rights for other downstream uses and users;

(b) To document transfers of water rights to and from the trust water rights program; and

(c) To provide a source of water rights the department can make available to third parties on a temporary or permanent basis for any beneficial use under chapter 90.03, 90.44, or 90.54 RCW.

(3) The department shall not use water banking to:

(a) Cause detriment or injury to existing rights;

(b) Issue temporary water rights or portions thereof for new potable uses requiring an adequate and reliable water supply under RCW 19.27.097;

(c) Administer federal project water rights, including federal storage rights; or

(d) Allow carryover of stored water from one water year to another water year.

(4) For purposes of this section and section 6 of this act, "total water supply available" shall be defined as provided in the 1945 consent decree between the United States and water users in the Yakima river basin, and consistent with later interpretation by state and federal courts.

NEW SECTION. Sec. 3 A new section is added to chapter 90.42 RCW to read as follows:

(1) The department, with the consent of the water right holder, may identify trust water rights for administration for water banking purposes, including trust water rights established before the effective date of this section.

(2) An application to transfer a water right to the trust water program shall be reviewed under RCW 90.03.380 at the time the water right is transferred to the trust water program for administration for water banking purposes, and notice of the application shall be published by the applicant as provided under RCW 90.03.280. The application must indicate the reach or reaches of the stream where the trust water right will be established before the transfer of the water right or portion thereof from the trust water program, and identify reasonably foreseeable future temporary or permanent beneficial uses for which the water right or portion thereof may be used by a third party upon transfer from the trust water right program. In the event the future place of use, period of use, or other elements of the water right are not specifically identified at the time of the transfer into the trust water program, another review under RCW 90.03.380 will be necessary at the time of a proposed transfer from the trust water program.

NEW SECTION. Sec. 4 A new section is added to chapter 90.42 RCW to read as follows:

(1) The department shall transfer a water right or portion thereof being administered for water banking purposes from the trust water program to a third party upon occurrence of all of the following:

- (a) The department receives a request for transfer of a water right or portion thereof currently administered by the department for water banking purposes;
 - (b) The request is consistent with any previous review under RCW 90.03.380 of the water right and future temporary or permanent beneficial uses;
 - (c) The request is consistent with any condition, limitation, or agreement affecting the water right, including but not limited to any trust water right transfer agreement executed at the time the water right was transferred to the trust water rights program; and
 - (d) The request is accompanied by and is consistent with an assignment of interest or portion thereof from a person or entity retaining an interest in the trust water right or portion thereof to the party requesting transfer of the water right or portion thereof.
- (2) The priority date of the water right or portion thereof transferred by the department from the trust water program for water banking purposes shall be the priority date of the underlying water right.
- (3) The department shall issue documentation for that water right or portion thereof to the new water right holder based on the requirements applicable to the transfer of other water rights from the trust water rights program. Such documentation shall include a description of the property to which the water right will be appurtenant after the water right or portion thereof is transferred from the trust water program to a third party.
- (4) The department's decision on the transfer of a water right or portion thereof from the trust water program for water banking purposes may be appealed to the pollution control hearings board under RCW 43.21B.230, or to a superior court conducting a general adjudication under RCW 90.03.210.

NEW SECTION. Sec. 5 A new section is added to chapter 90.42 RCW to read as follows:

- (1) The department shall seek input from agricultural organizations, federal agencies, tribal governments, local governments, watershed groups, conservation groups, and developers on water banking, including water banking procedures and identification of areas in Washington state where water banking could assist in providing water supplies for instream and out-of-stream uses. The department shall summarize any comments received on water banking and submit a report, including any recommendations, to the appropriate committees of the legislature for their consideration in the subsequent legislative session.
- (2) By December 31st of every even-numbered year, the department shall submit a report to the appropriate committees of the legislature on water banking activities authorized under section 2 of this act. The report shall:
- (a) Evaluate the effectiveness of water banking in meeting the policies and objectives of this chapter;
 - (b) Describe any statutory, regulatory, or other impediments to water banking in other areas of the state; and
 - (c) Identify other basins or regions that may benefit from authorization for the department to use the trust water program for water banking purposes.

NEW SECTION. Sec. 6 A new section is added to chapter 90.42 RCW to read as follows:

Nothing in this act shall:

- (1) Cause detriment or injury to existing rights or to the operation of the federal Yakima project to provide water for irrigation purposes, existing water supply contracts, or existing water rights;
- (2) Diminish in any way existing rights or the total water supply available for irrigation and other purposes in the Yakima basin;

- (3) Affect or modify the authority of a court conducting a general adjudication pursuant to RCW 90.03.210; or
- (4) Affect or modify the rights of any person or entity under a water rights adjudication or under any order of the court conducting a water rights adjudication.

NEW SECTION. Sec. 7 Nothing in this act may be construed to:

- (1) Affect or modify any treaty or other federal rights of an Indian tribe, or the rights of any federal agency or other person or entity arising under state or federal law;
- (2) Affect or modify the rights or jurisdictions of the United States, the state of Washington, the Yakama Nation, or other person or entity over waters of any river or stream or over any ground water resource;
- (3) Alter, amend, repeal, interpret, modify, or be in conflict with any interstate compact made by the states;
- (4) Alter, establish, or impair the respective rights of states, the United States, the Yakama Nation, or any other person or entity with respect to any water or water-related right;
- (5) Alter, diminish, or abridge the rights and obligations of any federal, state, or local agency, the Yakama Nation, or other person or entity;
- (6) Affect or modify the rights of the Yakama Indian Nation or its successors in interest to, and management and regulation of, those water resources arising or used, within the external boundaries of the Yakama Indian Reservation;
- (7) Affect or modify the settlement agreement between the United States and the state of Washington filed in Yakima county superior court with regard to federal reserved water rights other than those rights reserved by the United States for the benefit of the Yakama Indian Nation and its members; or
- (8) Affect or modify the rights of any federal, state, or local agency, the Yakama Nation, or any other person or entity, public or private, with respect to any unresolved and unsettled claims in any water right adjudications, or court decisions, including *State v. Acquavella*, or constitute evidence in any such proceeding in which any water or water-related right is adjudicated.

NEW SECTION. Sec. 8 This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately.